

MINUTES
NEVADA STATE BOARD OF OPTOMETRY
REGULAR MEETING

August 15th, 2003
Tahoe Biltmore
#5 Highway 28
Nevada Room
Crystal Bay, Nevada

A regular meeting of the Nevada Board of Optometry was called to order by Board President, Kurt G. Alleman, O.D., at 10:00 o'clock A.M. on August 15th, 2003, in the Nevada Room at the Tahoe Biltmore, #5 Highway 28, Crystal Bay, Nevada.

Identifying themselves as present were:

Kurt G. Alleman, O.D., Board President
Brad C. Stewart, O.D., Board Member
Jack Sutton, O.D., Board Member
George Bean, Board Member
Judi Kennedy, Executive Director
Tina Leiss, Senior Deputy Attorney General

Also present were:

Mario Aguero, O.D.
John A. Hunt, Esq.
Jeffrey D. Ferris, O.D.
Hal Taylor, Esq.

Dr. Alleman asked for public comment. There was no public comment.

The minutes of the regular meeting of the Board held on June 6th, 2003, were presented for approval. Dr. Sutton moved the minutes be approved as prepared. Mr. Bean seconded the motion. The vote was unanimous.

Moving to Agenda Item 3, Dr. Alleman opened the hearing on the Accusation of Judi D. Kennedy, as Executive Director vs. Mario Aguero, O.D., stating for the record, Dr.

Aguero is accused of violating NRS 636.286, by administering the therapeutic pharmaceutical agent, Tobradex, without obtaining the required certificate from the Board.

Ms. Leiss stated the Board had found the complaint filed against Dr. Aguero to have merit, and directed an accusation be filed. She continued, providing background for those present, stating, there had been a hearing scheduled before a hearings officer, and that pursuant to stipulation of the parties, it had been agreed the hearing would be conducted by the Board. Ms. Leiss advised the Board, Mr. Hunt, counsel for Dr. Aguero, had stipulated Dr. Aguero had administered the Tobradex, and the Board=s function would be to determine what penalty should be imposed. Ms. Leiss indicated staff would offer no recommendation as to the penalty. Ms. Leiss continued, saying there would be no opening statement, there would be no evidence introduced, but that the record would include those documents submitted by the complainant and the respondent to the hearings officer. It was agreed between Ms. Leiss and Mr. Hunt, the finalized minutes of the March 7th, 2003, regular board meeting would be included in the record.

Mr. Hunt expressed to the Board, Dr. Aguero=s appreciation for being able to appear and address the Board, stating Dr. Aguero felt it was important the Accusation be considered by his peers, as opposed to being heard by a third party hearings officer. Mr. Hunt stated he had brought the original medical record for the Board=s inspection.

Dr. Alleman placed Dr. Aguero under oath, noting for the record the presence of Dr. Aguero, his counsel, Mr. Hunt, Ms. Leiss, and Ms. Kennedy, .

For the record, Dr. Aguero stated his name, address, and occupation, stating he had been licensed to practice optometry in the State of Nevada since September, 1975, a period of approximately 28 years. Mr. Hunt asked if, during this period, a complaint had ever

been

filed against Dr. Aguero. Dr. Aguero responded in the negative. Mr. Hunt then asked Dr. Aguero if he admitted to violating NRS 636.286, when he administered Tobradex to Mr. Hernandez. Dr. Aguero responded, "Yes, sir."

Under questioning by Mr. Hunt, Dr. Aguero offered the following testimony.

Mr. Hernandez had been a patient of his for a number of years. At the time Dr. Aguero saw Mr. Hernandez in August, 2002, Dr. Aguero was having some personal problems, Dr. Aguero's office was understaffed, and Dr. Aguero personally escorted Mr. Hernandez to the exam room. Dr. Aguero recalled on reviewing Mr. Hernandez's chart, he had lost his right eye some 4 years prior some type of gun accident. Based on the required prescription, Dr. Aguero advised Mr. Hernandez he needed to consult with a retinal specialist regarding his contact lens prescription. During his examination of Mr. Hernandez in August, 2002, Dr. Aguero determined Mr. Hernandez had all the classic signs of conjunctivitis in his left eye. Dr. Aguero testified he then told Mr. Hernandez, because of the infection, he would not be able to prescribe contact lenses, and that he should consult a qualified optometrist or ophthalmologist to obtain a prescription for the infection. Dr. Aguero testified Mr. Hernandez, due to financial constraints, implored Dr. Aguero to give him something to treat the infection. Dr. Aguero continued, stating he had the Tobradex for his own personal use, that he had known Mr. Hernandez and his family for years, it seemed Mr. Hernandez was down and out, and that for humanitarian reasons, he administered the Tobradex. Dr. Aguero testified he had never, on any other occasion, given Tobradex to a patient, even though he had had similar situations arise in the past. Dr. Aguero continued, testifying his established protocol was to refer the patient to an ophthalmologist, but he was

experiencing numerous personal problems which clouded his judgment, adding that the moment he administered the drug, he realized it was not the right thing to do. Dr. Aguero went on to state that in order to protect the patient and himself, he immediately made an appointment for him to see an ophthalmologist. Dr. Aguero testified further that he did not in any way attempt to hide what he had done, nor did he profit from administering the drug. Dr. Aguero explained Tobradex is a combination antibiotic and steroid, and that it is one drug that would be used for treatment of an infection of the eye. Dr. Aguero testified he has had training in therapeutic drugs, but that he has not been certified by the Board to administer them. Dr. Aguero indicated he had taken the necessary courses for therapeutic certification, but that he had not yet received the certification. Dr. Aguero stated he did not know what follow-up treatment, if any, had been received by Mr. Hernandez.

Mr. Hunt indicated he had no further questions. Ms. Leiss indicated she had no questions for Dr. Aguero. Dr. Alleman asked if the Board had questions for Dr. Aguero. Under questioning by the Board, Dr. Aguero offered the following testimony.

The bottle of Tobradex given to Mr. Hernandez was full and unopened. Dr. Aguero never heard back from the ophthalmologist, he did not know if Mr. Hernandez followed through with the appointment. When asked why Mr. Hernandez would have thought Dr. Aguero would give him the drug, Dr. Aguero responded he thought perhaps he had given him things before. Dr. Aguero agreed that as a licensed professional, he should be held to a different standard than a lay person. Dr. Aguero stated he had given Mr. Hernandez directions on administering the Tobradex until he could go for the follow-up appointment with the ophthalmologist the following day. Dr. Aguero had made no attempt to contact the ophthalmologist to determine whether or not Mr. Hernandez had kept the appointment

made for him by Dr. Agüero's office manager. Dr. Agüero agreed, given an apparent erasure in the pencil written record of Mr. Hernandez, that in the future, his medical record notes would be made in pen, not pencil.

There being no further questions from the Board, Mr. Hunt stated Dr. Agüero had been licensed for 28 years, with an exemplary record, and that the incident leading to the filing of the complaint and accusation, was an exception, not the rule. Mr. Hunt asserted Dr. Agüero had given the drug to the his patient for humanitarian reasons, and that he did not profit from the action. Mr. Hunt opined the proposed \$5,000 fine and 3 year probationary period would have to be reported to the national data base, and may have an impact on Dr. Agüero's business. Mr. Hunt proposed Dr. Agüero pay the costs of the Board's investigation and be publically reprimanded. Mr. Hunt requested, and received, Dr. Agüero's assurance to the Board that a similar incident would not occur in the future.

Dr. Alleman advised the Board it needed to decide the issue of guilt or innocence. Dr. Sutton stated, there was no question of guilt, based on the admissions of Dr. Agüero. Dr. Stewart moved the Board find Dr. Agüero guilty of the violation contained in the accusation. Mr. Bean seconded the motion. The vote was unanimous.

Moving to the penalty phase, Dr. Sutton moved a fine in the amount of \$1,000 and a 3 year probationary period be imposed. Dr. Stewart stated, based on fines and probationary periods imposed in the past, and on the facts of the case as presented, he felt the fine should be \$5,000. Dr. Stewart went on to state the Board's function is to protect the public, and that during his tenure on the Board, there had never been a complaint filed that so directly affected public health. Dr. Stewart added he would be more inclined to reduce the probationary period than the administrative fine. Dr. Alleman proposed the

probationary period could end, contingent on Dr. Aguero=s receiving certification to administer therapeutic pharmaceutical agents. After further discussion, Dr. Stewart moved an administrative fine of \$5,000 be imposed and that Dr. Aguero=s license be placed on probation until such time as he received the necessary certification from the Board, or for a period not to exceed two years. Mr. Bean seconded the motion. The vote was unanimous.

The meeting recessed at 10:55 a.m. The meeting reconvened at 11:00 a.m.

The Board next considered Agenda Item 4, the complaint of Judi D. Kennedy, Executive Director vs. Mario Aguero, O.D. Ms. Kennedy stated for the record the allegation of the complaint is a violation of NRS 636.370[2], changing practice location without proper written notice to the Board. Ms. Leiss noted, pursuant to the June 6th, 2003, Stipulation, the parties had agreed to dispose of the complaint at this meeting, in essence eliminating the necessity of moving the complaint to the level of an accusation. Mr. Hunt pointed out, that during the relocation process there had been no instance where a patient had been unable to reach Dr. Aguero. Dr. Aguero apologized for the oversight. Ms. Kennedy stated she had received a phone call from Dr. Aguero=s office regarding the upcoming move. At the time of the call, Ms. Kennedy advised the calling member of Dr. Aguero=s staff that written notice and the required change of address fee had to be submitted to the Board prior to the time of the move. Ms. Kennedy went on to state, that in spite of her instruction, the fee and written notification were not submitted prior to the move. Dr. Sutton stated the provision of NRS 636.370[2] was clear, and that all practitioners should be aware of the requirement. Dr. Sutton moved there be a finding the complaint has merit

and that it be disposed of with the payment of a \$100 administrative fine. Mr. Bean seconded the motion. The vote was unanimous.

The Board moved on to Agenda Item 5, the complaint of Misty Richardson vs. Jeffrey D. Ferris, O.D. Dr. Alleman read, for those present, the applicable portion of the minutes of the Board=s June 6th, 2003, minutes. Dr. Alleman reiterated the Board had been advised by Ms. Leiss she believed Dr. Ferris, by way of his agreement with Shopko Stores, Inc., was accepting employment, either directly or indirectly, from a non-optometrist. Ms. Leiss had also advised the Board the rent provision in the agreement was in violation of the statutory requirement that rent, in a sublease situation, must be based on a fair market value. Ms. Leiss had pointed out Dr. Ferris= agreement included a provision that the rent was based on gross revenue, that if a certain amount of gross revenue was not realized, the rent was waived.

Dr. Alleman stated Ms. Kennedy, at the direction of the Board, and based on prior assertions of Dr. Ferris, had researched Board records to determine whether or not a prior complaint against another licensee, involving a similar situation, had been dismissed. Ms. Kennedy had determined there had been no such complaint filed. Dr. Alleman continued, stating, based on the advice of prior counsel, the Board had determined it would examine sublease agreements only when a complaint was filed. Dr. Ferris stated, as he had at the Board=s prior meeting, he did not understand why the Board had not previously reviewed his agreement, as requested, and that his attorney had told him it was compliant. Dr. Alleman pointed out the opinion of Dr. Ferris= attorney was based, in part, on a representation by Dr. Ferris that the Board had taken no action on a complaint against a doctor with a similar agreement. Ms. Kennedy reminded Dr. Ferris that a review of Board

records had revealed there had been no complaint filed, as he alleged, and that he had received copies of the documentation to that effect. There ensued a discussion between the members and Dr. Ferris regarding the provisions of NRS 636.300[2]; NRS 636.372; and NAC 636.240. Dr. Ferris indicated he did not know what action or actions he could take to rectify the situation. Dr. Stewart expressed his concern regarding Dr. Ferris= being repeatedly before the Board. Dr. Stewart moved the complaint be found to have merit, and that an accusation be filed. Dr. Sutton seconded the motion. The vote was unanimous.

The meeting recessed at 11:35 a.m. The meeting reconvened at 11:45 a.m.

The Board next reviewed Agenda Item 6, the Complaint of Andeen Rose-Clark vs. Glenn K. Roter, O.D. Dr. Alleman recited for the members, the allegations of the complaint. Dr. Sutton stated based on the information before the Board, this did not seem to be a standard of care issue. After discussion of protocol and method of treatment issues, Dr. Sutton moved Dr. Roter write a letter of apology to Ms. Rose-Clark, and that contingent on receipt of a copy of the letter of apology by the Board, the complaint be dismissed. Mr. Bean seconded the motion. The vote was unanimous.

Moving to Agenda Item 7, the Accusation of Judi Kennedy, as Executive Director vs. Van T. Tran, O.D. Ms. Kennedy advised the Board Dr. Tran had remitted the \$100 administrative fine. Dr. Stewart moved the Accusation be resolved based on receipt of the fine. Mr. Bean seconded the motion. The vote was unanimous.

Next considered was Agenda Item 8, the Accusation of Judi Kennedy, as Executive Director vs. Kevin C. Rowe, O.D. Ms. Kennedy advised the Board Dr. Rowe had remitted the \$100 administrative fine. Mr. Bean moved the Accusation be resolved based on receipt of the fine. Dr. Stewart seconded the motion. The vote was unanimous.

The Board reviewed the correspondence from Dr. Mazzulla regarding the dispensing and administration of oral steroids. Dr. Stewart stated, from reading NRS 636.024, Dr. Mazzulla could not dispense or administer oral steroids. The Board directed Ms. Kennedy to so advise Dr. Mazzulla.

As part of her report, Ms. Kennedy directed the Board=s attention to the proposed 2003-04 budget, and asked if there were questions or concerns. Mr. Bean moved the budget be approved as prepared. Dr. Sutton seconded the motion. The vote was unanimous. The Board directed Ms. Kennedy to proceed with the lease of new photocopy equipment.

Dr. Alleman asked for public comment. There was no public comment.

The Board scheduled regular meetings of the Board for October 17th, 2003, and January 9th, 2004, in Las Vegas, Nevada.

Mr. Bean moved the meeting adjourn. Dr. Stewart seconded the motion. The meeting adjourned at 12:05 p.m.